IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

No. 69.

CHICAGO, INDIANAPOLIS & LOUISVILLE RAILWAY COMPANY,
Plaintiff in Error,

vs.

PATRICK McGUIRE AND OTHERS,
Defendants in Error.

Reply Brief of Plaintiff in Error.

We have carefully considered the two arguments of learned counsel for the defendants in error, and we yet believe that each of our several contentions ought to be sustained.

THERE IS JURISDICTION.

The case of *Howard* v. *Fleming*, 191 U. S., 137, cited by counsel, is not adverse to our contention. In that case there was a conviction for the violation of a local statute. The case took the usual course until there was an affirmance by the Supreme Court of the state. At no time in the proceedings had there been any suggestion that the appeal ought to succeed for the reason that any right of the accused, as given by any authority of law of the United States, had been denied. At no time had the at-

tention of the state courts been directed to a consideration of the contentions, with this in view. There it was properly held, that although the questions in the case were fully considered and decided, yet, as they had not been considered in the light of the alleged Federal Right, there was no jurisdiction.

In the case of *Beals* v. *Cone,* 188 U. S., 184, cited by counsel, it appears that at no time was the attention of the state court directed to any claim of title or right under the laws of the United States. In speaking in that case, the court, among other things, by Mr. Justice BREWER, says:

> "And in the opinion of the Supreme Court, outside of the matters of estoppel and *res judicata* before referred to, there is nothing to even suggest that it was requested to consider any question of a title, right, privilege or immunity under the Constitution or laws of the United States. Indeed, while this case has evidently been hotly contested, yet the matters which were subjects of controversy and determination were questions of fact, concerning the time, extent and effect of the alleged discoveries of minerals, and also alleged wrongs in respect to the jury. To those matters, and to those alone, was the attention of the parties and the courts directed."

In the cases of *Leigh* v. *Green,* 193 U. S., 79, and *Mallett* v. *North Carolina,* 181 U. S., 589, this court held, that where a Federal question was raised in a petition for a rehearing, and on such petition it was decided adversely to the one making the claim, it had jurisdiction to review such decision on writ of error. There is absolutely nothing in either of these decisions which supports the contention of counsel.

The case of *Gableman* v. *Peoria, etc.,* 179 U. S., 335, is not in point. Its entire inapplicability is shown by

this concise statement of the case and the conclusion, by Chief Justice FULLER:

> "The question is whether the bare fact that the appointment of this receiver was by a Federal court makes all actions against him cases arising under the Constitution or laws of the United States, notwithstanding he was appointed under the general equity powers of the court of chancery, and not under any provision of that constitution or those laws; and that his liability depends on general law, and his defense does not rest on any act of Congress. We are of the opinion that this question must be answered in the negative * * *."

In the case of *Defiance, etc.*, v. *Defiance*, 191 U. S., 184, the plaintiff in error sought to invoke the jurisdiction of the courts of the United States, for the purpose of avoiding an anticipated adverse result in an action affecting its water rentals contract, with defendant in error, which was then pending in the courts of the state. When the litigation first arose in the state courts, on petition it was removed to the United States court; it was by that court remanded to the state court. At about the same time this action was begun in the United States court, for the purpose of accomplishing the same end, which the defendant there was then attempting to accomplish by defense in the action in the state court. There was no diverse citizenship, and this court held that as the case did not involve a right claimed under the Constitution or laws of the United States, it did not have jurisdiction. In the opinion, among other things, Chief Justice FULLER says:

> "Litigation in the state courts cannot be dragged into the Federal courts at such a stage and in such a way. The proposition is wholly untenable that, before the state courts in which a case is properly pending can proceed to adjudication in the regular

> and orderly administration of justice, the courts of the United States can be called on to interpose on the ground that the state courts might so decide as to render their final action unconstitutional."

It is also there held, that it is the right and duty of state courts to decide Federal questions, properly raised, and "the presumption is in all cases that the state courts will do what the Constitution and laws of the United States require."

In the case of *Home for Incurables* v. *New York*, 187 U. S., 155, this court held that it did not have jurisdiction on writ of error for the reason that "It is entirely consistent with the record that the home did not, at any time pending the case in the state court, set up or claim any such right." There it was claimed by the plaintiff in error that the state court "refused to recognize" the claim under the Constitution of the United States. But there was absolutely nothing anywhere in the proceedings calling attention to any such claim, and everything in the decision of the court was consistent with a want of any such claim. However, in this decision the court, speaking by Mr. Justice HARLAN, does use this language, which strongly supports our contention here:

> "In *Parmalee* v. *Lawrence*, 11 Wall., 36, 38, this court, following the previous cases of *Lawler* v. *Walker*, 14 How., 152, and *Mississippi & M. Co.* v. *Rock*, 4 Wall., 177, said it was essential to our jurisdiction in re-examining the judgment of the state court, that the alleged conflict between the law and the Constitution of the United States 'appear in the pleadings of the suit, *or from the evidence in the course of the trial*, in the instructions asked for, or from exceptions taken to the rulings of the court,' or it must be 'that such a question was necessarily involved in the decision, and that the state court would not have given judgment without deciding it.' Later

cases in this court have expressed the additional thought that *if the highest court of the state assumes that the record presents a question of Federal right, and decides against the party claiming such right, we will look no further and will proceed to the consideration of that question,* unless the decision is made to rest in part upon some ground of local law, sufficient enough, in itself, to sustain the judgment, independently of any question of Federal right."

In the case of *Johnson* v. *New York, etc.,* 187 U. S., 491, it was held that as the alleged Federal question or right had not been specially set up in any pleading, and as it was not decided, there was no jurisdiction.

In the case of *Mutual Life Co.* v. *McGrew,* 188 U. S., 291, it was held that a Federal question, first raised in a petition for a rehearing, was not presented in time to give this court jurisdiction on writ of error, where the petition for a rehearing was denied, without opinion by the state court.

It appears from the quotations given by counsel from the cases of *Bausman* v. *Dixon,* 173 U. S., 113; *Western Union, etc.,* v. *Ann Arbor, etc.,* 178 U. S., 239; *Gableman* v. *Peoria, etc.,* 179 U. S., 335, and *Pope* v. *Louisville, etc.,* 173 U. S., 573, that neither of these cases are in point on the question of jurisdiction.

The case of *Marrow* v. *Brinkley,* 129 U. S., 178, which counsel say is "exactly in point," is not in point at all. It appears from the statement of this case given by counsel, that there was a Federal question involved. But the court, in deciding the case, put its decision entirely upon non-federal grounds, and, therefore, there was no occasion for the intervention of this court. As is stated by counsel on page 8 of their second brief, in speaking of this case:

> "The decision of the state court in no way questioned the validity of that statute or any construction of it, but was based upon other grounds not involving a Federal question, namely, estoppel and laches, and the motion to dismiss was sustained."

In addition to the other decisions which we have heretofore cited, we call attention to the case of *Wedding* v. *Meyler,* 192 U. S., 573; that was an appeal from the Court of Appeals of Kentucky. The lower court had held invalid a judgment of an Indiana court holding that there was no jurisdiction. And, although no Federal right or question was by that name asserted, yet this court held that the decision necessarily involved such a question, and there was jurisdiction.

Wabash Ry. v. *Pearce,* 192 U. S., 179.

In speaking of the question in this case, counsel in their second brief, page 9, say:

> "The question is not of the authority, or verity, or credit of the decree, but what is the meaning of the words used * * *."

This is the Federal question. What is the meaning, the scope, the due effect of this decree? This court can review the decision for the purpose of determining whether its due effect has been denied.

> "Whether due effect has been given by a state court to a judgment of decree of a court of the United States is a Federal question within the jurisdiction of this court, on writ of error to the Supreme Court of the state."
>
> *Central Natl. Bank* v. *Stevens,* 169 U. S., 432, 460.
>
> *Crawford et al.* v. *Burke* (U. S. Sup.; decided Nov. 7, 1904).

It seems clear to us that this court does have jurisdiction to hear and determine this case. The purpose of the statute requiring a claim of title under the laws of the United States to be specially set up is not, primarily, to give this court jurisdiction, but to direct the attention of the state court to the fact that the claim is made under such law, or an authority under it. This is what is required, and all that is required. If the matter is brought to the attention of the court in such a way as that the court is advised that the title is claimed by reason of the laws of the United States, or an authority thereunder, and the court, with this in view, denies the title, there is jurisdiction.

Here is a case where it was necessary for the plaintiff in error to show its title to the property in dispute. Inasmuch as it appeared that title was claimed from the Louisville, New Albany & Chicago Company, by both parties, it was sufficient for plaintiff in error to show that the title of that company had passed to it, and not to the defendants in error. It attemps to show this by offering as its sole proof of that fact a decree entered in a court of the United States. Thus it is made to appear from the evidence that the sole claim is under this decree, and title is set up and claimed under it, and in no other way.

It is urged that something should have been said in the motion for a new trial, or the assignment of errors to show that the rights which we claimed were under the laws or authority of the United States. Counsel are well aware that the question of whether the verdict was right, or whether the peremptory instruction should have been given, were presented in the only way in which they could be under Indiana practice. If a motion for a new trial had contained such a specification alone, counsel

would have urged, and properly so, that no statutory cause for a new trial was assigned, and that the Appellate Court should refuse to consider the motion. If it had been stated in an assignment of error, and we had to stand or fall on that assignment, lawyers must agree that the Indiana court would have refused a decision, for the reason that the assignment presented no question for review.

Counsel have studiously avoided any attempt to show that there was any other way than the one adopted whereby this question could have been presented to the Circuit and Appellate Courts of Indiana for review. Indeed, it is so well settled that it can only be by motion for a new trial, assigning only the causes here assigned, and by assignment of error just as was here done, that it is idle to assume such learned counsel will deny it.

Bane v. *Keefer,* 152 Ind., 544.
City of Terre Haute v. *Fagan,* 21 Ind. App., 371.
Hedrick v. *Hall,* 155 Ind., 371.

This contention of counsel is amusing, when considered with their argument as to our second paragraph of amended complaint. There we did in detail give a history of our title, and claim that we had title by reason of the decree afterwards introduced in evidence, and the deed subsequent thereto. The court ordered this to be made more specific, and as we excepted to the ruling, declining to amend, the paragraph was no longer considered as a part of the case. This decision, denying our title thus set up, was also presented to the Appellate Court for review by proper exception, and assignment of error. The Appellate Court did not decide the question. It is now said that some local rule of practice was not

complied with in saving this ruling for review, and that, therefore, the Appellate Court was not called upon to pass upon its sufficiency. After all we find learned counsel contending that the questions must be saved and presented for review in such a way as that by the rules of practice in force in the particular state the court is called upon to decide the question.

This is true, in the very nature of things, when we remember that the purpose of setting up the question is to have the state court first decide it.

Here we did this. It was all we could do, and as the Appellate Court states that our sole claim of title is under a decree of the court of the United States, it is clear, beyond peradventure, that the court understood that our sole claim of title was under the laws of the United States, and authority thereunder exercised; that it regarded the presentation sufficient to call upon it to determine the scope and effect of the decree, and as a consequence our title by reason thereof, and, as it decided against our title, this court can determine whether its decision was right.

TITLE.

On page 6 of their brief counsel, citing authorities, say: "Under the law of the State of Indiana, proof of an equitable title will not support the averments of such a complaint," meaning our complaint, in which we assert a legal title. On page 10, speaking of the title which the evidence, in fact, showed, counsel say: "so that the plaintiff in error showed by this deed of 1896, from Brooks, *a legal title in* the property in controversy." This latter statement is correct, and it renders the first point, with authorities, a purely moot question.

It is said on page 9. as urged in our brief, that "Where title is claimed through a common grantor it is sufficient to trace it to that source."

Counsel in their brief, on page 10, say that each party to this litigation claims title through the Brooks deed, which was made in 1896. As far as the defendants in error are concerned, counsel rest their claim entirely upon the title which the Louisville, New Albany & Chicago Company received through this deed. The plaintiff in error claims whatever title the mortgagor company got by reason of the Brooks deed, and also claims by reason of the title which it received in 1862, the validity of which is recognized and confirmed in the Brooks deed. Of course, it would have been sufficient here for plaintiff in error to have simply shown the mortgages by and the decrees against the mortgagor company, and the subsequent deed of sale and the deed to plaintiff in error, together with the fact that defendants in error claimed title through the same company. However, the plaintiff went

one step farther than this and showed the Brooks deed conveying title to the railway company, and also a foreclosure proceeding conveying title to railway property and all other property of the Louisville, New Albany & Chicago Railroad Company to it. The Brooks deed recites on its face: "Said piece or parcel of land being the same platted and dedicated for depot grounds, and duly recorded April 8, 1862." (pp. 155, 156.)

The plaintiff in error claims under the Brooks deed, and also under the dedication recognized in the Brooks deed. The defendants in error put their whole claim on the Brooks deed, but they endeavor to deny the dedication which is fully recognized and confirmed in the deed through which they claim. Our claim of title under the plat and the deed are consistent with the recital in the Brooks deed. The claim of defendants in error under the deed alone must be consistent with the deed, for they cannot accept it in part and reject it in part.

This recital in this deed required the consideration of the plat referred to, in connection with the deed.

Watson v. *Boylston*, 5 Mass., 411.
Clough v. *Bowman*, 15 N. H., 504.
Hoyatt v. *Phifer*, 15 N. C., 273.

It is a rule of construction too well settled for controversy that where one instrument of title refers in some way to a prior one, in interpreting and construing the subsequent one, the prior is to be considered as a part of it.

In view of this statement in the Brooks deed, and of this principle, counsel's conclusion that there was no title except by possession prior to the Brooks deal is without merit.

THE MEANING OF THE MORTGAGES.

Counsel seem to be laboring under the impression that this court is to be governed by the reasoning which was brought to bear in the Indian court. That if our reasons for a reversal in that court were not as strong as they now are, the appeal ought to be denied. We understand that this court decides this case for itself. It learns the questions in issue, and for itself determines the law applicable thereto. All that occurred in the Indiana court here to be considered is sustained by the certificate of the clerk of that court. We do not find anything in the record supporting these statements of counsel.

Counsel contend that the concluding clause of the mortgage of 1890 could not enlarge the terms of the grant going before. They also quote on page 18 a paragraph which it is said is taken from the granting clause of the mortgage. In this statement counsel are in error. This is not taken from the granting clause at all, but from the body of the attempted specific description in this mortgage. The granting clause is found in our original brief at pages 4 and 5. It will be noted that this clause, after stating that the mortgage covers all property of every nature, wherever situate, concludes: "more particularly described as follows:" then follows an enumeration of the counties in which its railway is, also certain articles of its property, and following this, and in and as a part of this attempted specific description of the property to be mortgaged, is found the clause which counsel have selected, and which they state is a part of the granting

clause. If this was, in fact, a part of the granting clause, a different question might be presented. But it is not, and, as this court has held in a case already cited, that where the granting clause shows an intention to mortgage all property, there will be no reduction of security, even though, in the attempted specific description, some of it is omitted.

Here we have just such a case. The granting clause makes it absolutely clear that all property was covered thereby, whether then owned or thereafter acquired. The concluding clause also makes it clear that the parties intended to mortgage all, and they thereby expressly declared that if all had not been described in the attempted specific description, it was to be regarded as covered thereby the same as if it was specifically described.

This mortgage of 1890 contains a copy of the resolution of the board authorizing it to be made. In this resolution the officers are directed to pledge all railway property, then held or thereafter acquired as security, and in conclusion it is there recited that they may also mortgage "all and singular its property of every kind and nature, real, personal and mixed, now owned or at any time to be hereafter acquired, in possession or expectancy, including the corporate and other franchises of the company." (P. 73.)

While the *habendum* of a deed cannot operate as a grant, yet it may enlarge or diminish a grant, where it is so worded as to indicate a clear intention to do so.

Summer v. *Williams,* 8 Mass., 162; 5 Am. Dec., 83.

Edwards v. *Bell,* 75 Ind., 401.

It has been held that the *habendum* of a deed will control the granting clause where they are inconsistent.

Singleton v. *School Dist.*, 10 S. W., 793.
Baskett v. *Sellers*, 12 S. W., 9; 93 Ky., 2.
Barnett v. *Barnett*, 37 Pac., 1049; 104 Cal., 298.
Pynchon v. *Stearns*, 11 Met., 316.
Ball v. *Foreman*, 37 Oh. St., 141.
Doren v. *Gillum*, 136 Ind., 134.

However, this question does not seem to be very important here as both the granting clause and the *habendum* are consistent, and each of them shows a clear intention to mortgage the property here in controversy.

The case of *Galveston Railroad* v. *Cowdrey*, 11 Wal., 460, is much in point on the merits. There, the charter permitted the railway company "to acquire, by purchase, donation or in payment of stock, such real estate as the directors should think desirable to aid in the construction or maintenance of said road; and to alienate or mortgage the same for the constructing or maintaining said road. * * *" (Pp. 460-1.)

In speaking of the scope of this authority, the court, by Mr. Justice BRADLEY, on page 474, says:

> "It is admitted that the charter authorizes the company to mortgage certain real estate, which it was authorized to acquire for the purpose of aiding in the construction or maintenance of the road. But they insist that this power applies to outside real estate procured as ancillary to the main design of building the road, and does not apply to the right of way and track of the railroad. But we think it is general, and applies to any real estate which the company might acquire in any way."

The extent of the lien on property after acquired is determined by power and intention.

Short on Ry. Bonds, etc., 189.

Compton v. *Jesup*, 68 Fed., 263, 286.

In Sec. 134, in his work on Railroal Securities (1st Ed.), after stating that the power to mortgage after acquired property "is held to be limited to such acquisitions as it then has the power by charter or by general law to make," Jones has this to say about the case of *Meyer* v. *Johnson*, 53 Ala., 237, cited by counsel:

> "Upon this ground it was held that a mortgage by the Alabama & Tennessee River Railroad Company did not cover a grant of lands subsequently made by the United States, which the company was by special act empowered to accept, because it had no power to accept such a grant when the mortgage was given, and the acquisition of such a land grant was not then contemplated. Although the mortgage in terms covered the road and the corporate franchises, together with 'all other property now owned and which may be hereafter owned by the railroad company,' its operation was restricted to such property as the company then had power to receive and hold."

The same author, Sec. 104, has this to say about the case of *Shamokin Valley R. R. Co.* v. *Livermore*, 47 Pa. St., 465, which counsel say "is squarely in point":

> "Under a mortgage of a road, 'with its corporate privileges and appurtenances,' only such property passes as is directly appurtenant to the road and is indispensably necessary to the enjoyment of its franchises. Therefore such a mortgage does not cover town lots adjoining the roadbed, without specific mention of the lots, although purchased by the company ostensibly for a basin to connect the road with river navigation, unless as a matter of fact such lots are essential to the enjoyment of the corporate franchises."

In the case of *Maxwell* v. *Wilmington, etc.*, 77 Fed., 938, cited by counsel, the court had to consider the question of whether the provisions of a mortgage were broad enough to cover any future acquired property. The court recognized the power to make such a mortgage, but in speaking of the one before it says:

> "There are no expressions, terms or language in the mortgage which, by the broadest interpretation, can be construed to apply to any other property than to that which was in existence and owned by the company on June 24, 1890."

In the case of *Morgan* v. *Donovan*, 58 Ala., 241, the charter of the company authorizes it to hold such real property, "as may be necessary and convenient, for the construction, maintenance and management of the railroad." The mortgage in controversy covered "the land occupied by said railroad, or hereafter acquired, owned or occupied, * * * including all depots, etc., now owned and occupied or hereafter acquired in connection with the said portion of said railroad, situated upon or lying within the limits of said city, or upon or adjacent to said portion of said railroad and the route and line thereof."

On page 256, in considering the mortgages, the court says:

> "We think the sole question necessary to be considered in this case is whether the mortgages embrace and convey the lots and wharves in controversy. If the terms of the granting clauses are broad and specific enough to include them, then we think there is no question that the title to the defendants is paramount to that of plaintiff. On the other hand, if the mortgages do not convey them, then the plaintiff has the superior title. We quote from the Act of Incorporation only as aid in enabling us to determine the true meaning and scope of the mortgage conveyances."

The court holds in the decision of the case that it was not the intention to mortgage any but property used in connection with the operation of the road or acquired for that purpose, as it was only such property that its charter permitted it to acquire.

From this reference to the authorities cited by counsel which have not heretofore been discussed, it appears that none of the decisions cited support the contention so far as it concerns the mortgage of 1890; or so far as each of them concerns all property owned at the date of the mortgages.

THE DECREE.

The description in the decree is not open to any objection. It appears that the court embodied in the decree the identical description which is found in the several mortgages, and ordered to be sold all property mortgaged or intended to be mortgaged. A description of "all property" in any case is sufficient. Evidently the court was of the opinion that this description was sufficient, for it approved a deed of sale conveying all of the property of the mortgagor company, wherever situated, to the purchasers at the foreclosure sale.

The principle announced in the case of *Bowen* v. *Wickersham*, 124 Ind., 404, cited by counsel is yet the law in Indiana, but it has no application here. The principle there announced refers to a case where there is reference to other instruments in a mortgage for a description of the property mortgaged. In that case the decree and other descriptions of the property contained a specific description of a tract, and provided that the decree affected all of the tract thus described "except such portions of the above described tract of land as have hereto-

fore been laid out in town lots by James Roach, and have been by him sold and conveyed prior to the execution of of the mortgage herein." There, in order to get any meaning from the description it would have been necessary to learn of the tracts thus platted and conveyed, and by excepting them the tract ordered sold would be determined. The court holds that under such circumstances the things which would be disclosed by this investigation must be averred in the complaint, and the property actually affected described therein, and in the decree. That the description in the decree must be complete, and could not be completed by reference to other instruments.

The test is thus stated by the court in the quotation set out by counsel:

> "The sheriff must be able to identify the property from the description contained in the decree, and the purchaser can only be put in possession of the land definitely described in the decree."

There is here no reference to any other instrument for a complete description, but the property is described as all of the property of the mortgagor. We have not yet been able to find a case where it has been held that such a description is indefinite.

Take it here. It is conceded by counsel that this description of all property used for the purposes of the railway company is sufficient as to it. That such property is thereby affected and correctly ordered sold. But to determine the property affected by such an order it is necessary to determine two things: First, is the property owned by the mortgagor corpany? Second, is the property employed in the purposes of the company, so as to be within this part of the decree? To determine the property affected by the general description of all prop-

erty, it is only necessary to determine whether it is owned by the company. The one conceded to be good contains two elements of uncertainty; the one contended to be bad contains but one, and that is one of the elements of doubt in the admitted one.

The practice of thus describing property in decrees on sale of railway property is so universal that the absence of one authority questioning its sufficiency is sufficient to justify the court in holding that it cannot be assailed.

In the case of *Kneavels* v. *Railway*, 66 Fed., 229, referred to at length in our original brief, p. 74, it was held that where a decree was general, as here, purporting to convey all property, the one who denied that a particular piece of property was not conveyed by it had the burden of establishing this fact.

In the case of *Kibbe* v. *Thompson*, Fed. Cas., 7754 (5 Biss., 226), it was held that where a decree did not describe property affected thereby, but merely referred to a place where a proper description could be found, it was a question of fact to be determined by the court or jury as to just what property passed by the decree.

Jones, in his work on mortgages, Sec. 1575, says:

> "The decree and order of sale may properly follow the terms of the mortgage, when this upon its face appears to convey the entire estate, and the officer must sell accordingly; but the purchaser will take only the interest the mortgagor had in the premises, and it is no ground for reversal that the mortgagor had only an equitable interest."
>
> *Pere Marquette Ry. Co.* v. *Graham* (Mich.), 99 N. W., 408.

In the case at bar it is clear that all of the parties to the foreclosure proceeding regarded this description as abundantly sufficient. The intention to mortgage all is clear. The intention to decree the sale of all, to sell and

convey all, is clear. The purchaser has a deed from the special master containing a description of all property, which as a description in a deed must be admitted to be sufficient. The purchaser took possession of all, and the plaintiff in error is shown to have been in possession of this property during the time of this controversy. Under these circumstances it is plain that the requirements of the law have been substantially met, and that the defendans in error are not in a position to make this collateral attack upon the decree.

The defendants in error, at page 12 of their second brief, set out a statement from the decree to the effect that the property covered by each mortgage is the same and identical. This statement is not to be confused with the statement from our brief set out at page 11 of the same brief. Ours refers to the scope of the provisions of the different mortgage; those of the decree to the property which was, in fact, covered thereby. The court does find that the property covered by each was and is the same and identical property. And we affirm that this is the fact. We endeavored to show it in the Indiana court, and it, holding that the recital of dedication did not commit the defendants in error to that proposition, and excluding the plat and other evidence, prevented us from showing that this property was owned at the date of each of the several mortgages, and was covered by each of them. This is the fact. The railway company has been in possession of this property since 1862, under the title given it by the dedication of that date. The deed of 1896 did not give it the title, but it does set at rest any of the technical objections which might be, and which defendants here are asserting against the sufficiency of this dedication. It was, indeed, a conveyance to set at

rest its entire title. In view of their attitude placing their whole claim on the deed of 1896, the defendants are committed to the proposition that there was a dedication, and that it was completed in 1862. This commits them to the proposition, as we believe, that this property was conveyed by each of the mortgages, extending to all then owned property. But if not, if the plat had been admitted, it, with the other evidence, would have shown title from this early date—a fact which, until now, has never been disputed.

This statement from the decree, and this position of counsel with reference to it, but emphasizes our contention that, by excluding this plat, the court refused us the right to show the true scope and effect of this decree, and thereby deprived it of its due effect, and we of our title which we would have but for this refusal.

THE PLAT EXCLUDED.

This brings us to the contention of counsel that the rejection of the plat, and the other rejected evidence, does not present a Federal question.

Earlier in their brief counsel have argued that the after acquired property clause did not include this property, because of its alleged limitations. It is also urged that as the title was derived by reason of the Brooks deed, it is apparent that the "then owned" clause of the several mortgages could not possibly reach it, for the reason that his deed dates subsequent to the date of either of the mortgages.

If the mortgage of 1890 is as broad as we claim, perhaps this question is not an important one. But if the court should hold that it only included property thereafter

acquired for the purposes of the road, then it becomes an important one. What more effective way could a state court adopt to defeat a title claimed, as is this one, than to exclude the evidence offered, for the purpose of showing title or the date at which the mortgagor acquired it? If the question of whether it vested by reason of the decree is to turn upon the date at which it is acquired, how can the right be more effectually denied than to exclude evidence offered for the purpose of showing that it was acquired in time to be covered by the mortgages and vested by the decree and sale?

But this is a Federal question. If there was error in refusing to permit the plaintiff in error to introduce this plat and the other excluded evidence, due effect was denied the decree for the reason that it would have thereby been made to appear that it did pass by reason of the decree, and its effect upon all property owned at the date of the mortgage.

The case of *Martin* v. *Hunter's Lessees,* 1 Wheaton, 304, referred to at length in our original brief at page 33, fully answers this contention of counsel.

As we have before shown, the dedication in 1862 is recognized in the Brooks deed of 1896. Of this deed counsel at page 10 of their brief say:

> "Both parties claim title from the same common source, to wit: James C. Brooks and wife."

And on the same page counsel say this in regard to this deed:

> "The deed from Brooks covers the ground thus occupied by the railroad and used, and also the ground in controversy. * * *"

It is clear that they base their whole claim of title on the Brooks deed, or rather, the interest which was thereby

transferred to our common grantor. We, too, by reason of the after acquired clause claim whatever title was thereby given, but we also claim title which was given by the dedication in 1862, which is recognized in this deed. Claiming as they do, in whole, or even in part, through this deed, defendants in error are not in a position to deny the truth of the fact of dedication recited in the Brooks deed. It is well established that one is bound by the statements and recitals in the muniments of title through which he claims.

In the case of *Carver* v. *Jackson*, 4 Peters 1, this court, speaking by Mr. Justice STORY, had to consider the fact of the non-production of a lease, or other proof thereof, than by a recital of a marriage settlement deed, under which the parties claimed. Speaking of this recital it is said:

> "We are of the opinion not only that the recital of the lease in the deed of marriage settlement was evidence between these parties of the original existence of the lease, but that it was conclusive evidence between these parties of that original existence, and superseded the necessity of introducing any other evidence to establish it.
>
> * * * It is laid down generally that a recital of one deed in another binds the parties and those who claim under them. Technically speaking, it operates as an estoppel, and binds parties and privies —privies in blood, privies in estate, and privies in law."

This question was considered and decided in the case of *Lessee of Kinsman* v. *Loomis et al.*, 11 Ohio, 475, 479. There speaking, the court says:

> "The recital in the deed from Swift and others to the trustees of the Erie Land Company, is next to be considered. The preamble sets forth: 'Whereas, the trustees of the Connecticut Land

> Company have, by separate deeds, dated on the ..... day of ....., 1798, reconveyed to the parties of the first part, respectively, all the right, title and interest in and to' certain lands, including the premises. Now, the plain effect of such a recital as this is to conclude the parties to that deed, and all who claim through them, from denying the existence of such conveyance as, in this deed, is averred to have been made. The estoppel upon them is as effectual as if it were from warranty."

In the case of *Smith* v. *Lock et al.*, 18 Mich., 56, it was held that where one conveyed to another property described as being bounded by a village street, he could not afterwards deny that it was so bounded, or that there was a street at such a place.

In the case of *White* v. *Smith*, 37 Mich., 290, it was held:

> "When premises conveyed are described as fronting a certain number of feet on a specified street, the grantor and all who claim under him are estopped from afterwards asserting that the street referred to did not extend in front of the premises." (Syllabus.)

In the case of *Pillsbury* v. *Alexander*, 40 Neb., 242; 58 N. W., 859, the court had to consider a plat which had been recorded, but in the execution of which none of the statutory requirements had been complied with. In speaking of its binding force the court says:

> "Their platting this addition, filing the plat in the recorder's office, and leaving the spaces for streets, and their sale and conveyance of part of the property in this addition, described as lots and blocks of the addition, estop Arnold and Abbott, and their heirs, grantees or assigns, from claiming any title whatever to any of the land laid out as streets in said addition; and such acts amounted to a common law dedication of the land platted as streets to the public."

In the case of *Cobb* v. *Oldfield*, 151 Ill., 540; 38 N. E., 142, the court considers this question, and, although holding that the principle did not there apply, says this:

> "We recognize the rule of law, so frequently applied in this court, that a party claiming under a deed cannot be permitted to deny any of the material recitals therein, however contrary to the truth. (*Byrne* v. *Moorehouse*, 22 Ill., 605; *Kruse* v. *Wilson*, 79 Ill., 239; *Rigg* v. *Cook*, 4 Gilman, 336; *Orthwein* v. *Thomas*, 127 Ill., 561, 21 N. E., 430.)"

Devlin on Deeds (2 Ed.), Secs., 992, 995, 997, 1000, 1027 and 1311a.

Hanly v. *Blackford*, 31 Ky., 1; 25 Am. Dec., 114.

Hart's Heirs v. *Johnson*, 6 Ohio, 87.

Fisk v. *Flores*, 43 Tex., 340.

Douglass v. *Scott*, 5 Ohio, 194.

Jackson v. *Parkhurst*, 9 Wend., 209.

Torrey v. *Bank*, 9 Paige, 649.

City of St. Louis v. *Wiggins Ferry*, 15 Mo. App., 227.

Robbins v. *McMillan*, 26 Miss., 434.

Pinckard v. *Milmine*, 76 Ill., 453.

Wiseman v. *Hutchinson*, 20 Ind., 40.

Croskey v. *Chapman*, 26 Ind., 333.

Brannon v. *May*, 42 Ind., 92.

Coleman v. *Watson*, 54 Ind., 65.

Hazlett v. *Sinclair*, 76 Ind., 488.

Chicago, etc., v. *McEwen*, 71 N. E., 926, 928 (Ind. App.).

Here is a statement in a deed through which the defendants in error claim, that this property was dedicated for depot purposes in 1862. Here is notice directly brought home to the parties, not only that this deed is not the sole source of title, but that the property was dedi-

cated in 1862. As against the defendants in error, and all claiming under this deed, the dedication thus recognized was made valid for all intents and purposes, and they, now claiming under this very deed, are not in a position to deny this dedication.

In the light of authorities cited, it seems that by the introduction of the deed, and the basis of claim upon it, the defendants in error are absolutely committed to the proposition that this property was dedicated in 1862. The dedication recognized ought to have been fully explained, and it was for this purpose that the plaintiff in error was entitled to have this plat, and the other excluded evidence, admitted.

But even with the evidence which did go to the jury, the deed admitting dedication, possession since 1862 and use for depot and railway purposes of much of this property during all of the time, payment of county taxes and leasing the property, not only shows title from the date of the plat, but any other claim by defendants in error is inconsistent with the statement of this deed through which they claim, and by the statement of which they are bound.

Respectfully submitted.

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